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Executive Summary

Floor64 is an online media, research and consulting company, most well known for the Techdirt blog and community, as well as for its research and events about key trends and issues related to technology, technology policy, law, economics, innovation and business models, which is now part of our recently launched think tank, the Copia Institute. I started the company, first as a hobby email newsletter in 1997, then later as a hobby website, eventually turning it into a full-fledged business in early 2001. Over the years, Techdirt has written about and reported on a number of key issues related to the internet and technology policy, as it relates to innovation. For example, a study from the Berkman Center at Harvard University on the reporting that occurred around the 2011/2012 debate on the proposed SOPA and PIPA copyright laws found that Techdirt was the “single most important professional media site over the entire period, overshadowing the more established media.” As a company, we have also done research into technology trends and policy for a number of Fortune 500 companies, including Volkswagen, Dell, IBM, Oracle and SAP.

This entire business was built on the basis of a free and open internet. After starting out as a simple email newsletter, we put up our first website on a \$30/month shared web hosting plan from a company that I found late one night in 1998 after doing a web search (pre-Google). Today, we’re still hosted by that same company, but with multiple dedicated servers, rather than a shared platform. We were able to build our business thanks to that ease of getting on the internet and having our work available to anyone at the same level as major media companies many thousands of times our size. To this day, I’ve never met in person the small team at our hosting company who manages our servers. Instead, we’ve built a successful business entirely over the internet, in which this team helps manage much of our infrastructure and allows us to compete on an equal playing field with every other site.

Similarly, despite living in the heart of Silicon Valley at the time we incorporated in early 2001, I was completely unable to get broadband access for many years, managing the entire site through either a dial up or an incredibly slow wireless modem. Even today, still living in the heart of Silicon Valley, I have only one true broadband option, and it’s with a company I would prefer not to do business with.

Over the past two years, we have been excited about the rapid plans for expansion from third party broadband providers, such as Sonic and various wireless providers who we hope will be able to provide more broadband competition. However, we fear that the new proposed rules from the FCC will undermine this, and keep us locked in an uncompetitive market with unappealing options.

An even greater fear is that, without the strong open internet rules that the FCC put in place two years ago, we will be entering a world where it will be much more difficult for new companies, like mine, to spring up organically on the internet. Instead, we will exist in a world where large companies are able to pay their way into getting better access to customers, and where the

dominant broadband access providers will be able to harm startups and small internet services who don't have the leverage of larger companies.

We fear that with the proposed rolling back of the rules, this ease of building a business online, which was so crucial to us, would become next to impossible for the next generation of internet companies. The next person kicking off something as a hobby and hoping to turn it into a business might find that rather than being able to quickly jump on a cheap hosting plan to build her business, she'll have to worry about paying additional fees to guarantee that her site will actually load at a reasonable speed so the public does not just move on to a large, established player who paid up for the fast lane.

Furthermore, given our role in often writing about and criticizing existing dominant broadband access players and various front groups they have funded, we are quite concerned that any setup allowing priority access to some parties will be denied to us for a variety of reasons really aimed at limiting our speech and participation in these debates. While we might be able to sue at the FCC for the harm created, as a small business with no full time lawyers or lobbyists, our ability to protect ourselves would be significantly limited -- allowing broadband access providers an easy way to stifle criticism coming from sites like ours.

Two separate court rulings concerning open internet rules have made it abundantly clear that classifying broadband as a Title II service is the only way to achieve open internet goals. While we understand that some internet access providers worry about too much power in the hands of the FCC, the clear forbearance from most of the Title II rules has made it clear that the current rules can be used to protect consumers against bad behavior, but limit the FCC's ability to become overly meddlesome in other aspects of ISP operations and business models.

In short, the FCC was correct two years ago in protecting an open internet with clear and straightforward rules under Title II. It was that kind of open internet that allowed us and many other companies to exist in the first place. Rolling back those rules would be a huge mistake, would limit competition and would greatly harm the important internet ecosystem that so much of the economy now depends on.

Floor64 and Techdirt

Without the open internet, Floor64 would not exist today. Started on a whim, initially as a hobby, it was only possible because, at first, I could send around emails, and then I could expand to the web for the low price (then) of a \$50 domain name and \$30/month web hosting -- which enabled me to put up a website that could easily compete with the NY Times or the Washington Post. Over the years, Techdirt has built a strong and loyal community, as we've reported on numerous issues related to technology, innovation, tech policy, broadband, intellectual property and more.

As we've grown as a business, we've been able to expand our infrastructure as well, making it more robust, moving from a shared server to a dedicated server, then two and eventually many dedicated servers. We've been able to make use of a variety of internet tools and services to make sure that visitors to our site can get it to load quickly, keeping it resistant to downtime and providing an enjoyable experience across the board.

Throughout this process, we knew that we only needed to focus on our own infrastructure. If we also had to worry about making sure we had priority access to various internet service providers just in order to "keep up" with the competition, not only would it have created an administrative nightmare, but it likely would have priced us out of business entirely.

The media business is a low margin business, often heavily reliant on the highly variable and cyclical advertising market. If we also had to pay each and every broadband access provider to make sure that we could stay competitive, we would not be able to do so.

As a small media business, we are not afraid of competition. Rather, we thrive on it. We learn from other media websites, both large and small, and expect them to learn from us. This allows us all to innovate and learn, figuring out ways to better serve our community with news, information and analysis they need and want. The explosion over the last decade and a half of alternative media forms has been a tremendous boon to knowledge and innovation. The rise of blogs, new media sites and all sorts of other outlets for speech and communication has created a wonderful marketplace of ideas and an opportunity for many new voices to be heard.

This is only possible thanks to a free and open internet, in which the barriers to entry are low, and the ability to get online in a manner equal to the NY Times is as easy as clicking a few buttons. A system that involves picking winners and losers would lead to the erosion of such a marketplace of ideas, again cordoning off voices and ideas, by making it impossibly hard for the marginalized to speak out.

Furthermore, as a frequent critic of legacy broadband access providers, it does not seem unreasonable to fear that these players would make use of pretextual reasons to seek to block any attempt we made to make use of a "commercially reasonable" fast lane, in an effort to stifle our criticism. There are existing stories of cable companies rejecting advertisements that criticize those companies¹ showing that this is not an unreasonable or unprecedented concern.

As a small business, with no legal staff or lobbyists, having to challenge whether or not a broadband access provider's decisions on priority access are "commercially reasonable" would be a regulatory nightmare, cost prohibitive in the extreme and a massive operating distraction.

Title II with Forbearance Is A "Light-Touch" Regulatory Framework

¹ <http://firedoglake.com/2008/06/10/comcast-rejects-fisa-ads-critical-of-comcast-take-action/>

Much of the NPRM and the public debate around this effort to roll back the 2015 rules argues that we need to somehow “return” to a “light-touch regulatory framework” that helped bring about the internet we know and love. This is a strange argument in that it not only misrepresents, or takes out of context, the history of internet development, it similarly misrepresents the nature of the current rules.

First, during the most major buildout phase of the internet, much of it was under Title II as a telecommunications service anyway. Despite public statements -- and the NPRM directly -- harkening back to the Clinton era and the Communications Act of 1996, it must be noted that internet access through both dialup and DSL were clearly under Title II. Indeed, in starting my own company, the fact that I had a plethora of initial internet access choices was because of open access rules under Title II. There was widespread competition and many, many options. There was also tremendous investment in broadband buildout. It was only later, after broadband was reclassified, that things changed.

To argue that the internet existed outside of Title II going back 20 years is simply rewriting history. Similarly, arguing that investment in broadband buildout was because of light touch regulation is also wrong. It was clear demand in the marketplace that drove investment.

There is also one other major difference between 20 years ago and today: the lack of competition in the market. In the early days of the commercial internet -- thanks in large part to open access rules -- there was widespread competition in internet access services. Despite years of false promises from previous FCC commissioners about pending competition from new infrastructure (broadband over powerlines?), the market has clearly consolidated down to just a few small players -- dominated by Comcast -- and with two other players, Verizon and AT&T frequently looking to offload their wired broadband access.

Comcast’s market dominance has serious consequences for the internet. The company is regularly considered one of the most hated companies in America² year³ after year⁴ after year⁵. Indeed, the fact that Comcast is my *only* choice for true broadband, despite living in the heart of Silicon Valley, is the reason that I still don’t have real broadband speeds at home (instead, surviving on legacy DSL via a third party provider, Sonic, who utilizes legacy AT&T infrastructure). Years ago, when I was running Floor64 from home, I did have Comcast, but spent a month where it went down every day from 10am to 4pm. Each day I would call Comcast, only to be told that it was “scheduled maintenance” and would be back that afternoon. No matter how many days this happened, and despite always being told it was “scheduled” maintenance, the company refused to tell me if there would be service the following day or not. Eventually I left Comcast and I have no desire to go back to being a customer.

² <http://www.pcmag.com/news/350979/comcast-is-americas-most-hated-company>

³ <https://consumerist.com/2014/04/08/congratulations-to-comcast-your-2014-worst-company-in-america/>

⁴ <https://consumerist.com/2010/04/26/congratulations-comcast-youre-the-worst-company-in-america/>

⁵ <http://www.marketwatch.com/story/this-is-the-most-hated-company-in-america-2016-06-01>

With such dominance in the marketplace comes inevitable bad behavior. The FCC in public statements and in the NPRM talks about the past as if the market is the same as it was then, but it is not. The large internet providers, starting with AT&T (back when it was SBC) made it clear that it intended to violate the principles of an open internet over a decade ago, when its CEO complained about successful internet companies accessing *his* network without paying (ignoring that everyone was, in fact, paying for their own connectivity).

This combination of factors should lead the FCC to rightly conclude that using Title II, with forbearance, has been the proper approach and should remain as such. Early internet growth happened under a Title II regime. The slowdown of such growth and massive consolidation occurred after Title II was removed. And the growing dominance of a few giant broadband players -- with a long history of mistreating their customers and expressing strong interest in breaking an open internet in their own favor -- makes it clear that we need the current rules under Title II to remain in place.

We Changed Our Mind, And You Can Too

It should also be noted that for many years, at Techdirt, we opposed the FCC putting in place official open internet rules, even as we supported an open internet. Our fear -- as with what appear to be the concerns of the current FCC leadership -- was that the FCC could abuse its power to over-regulate and stifle innovation on the internet. We feared that such rules would be counterproductive and lead to excessive government meddling.

We changed our mind on this for three reasons, and the current FCC leadership should carefully consider all three:

First, the increasing consolidation and lack of competition in the broadband market. As discussed earlier, over the past twenty years, we've seen internet access move from a competitive market, based on open access, to a very consolidated and limited market, dominated by a few giant players with a long history of consumer abuse and poor customer service.

Second, the clear willingness to abuse such market dominance. Over a decade ago, AT&T CEO Ed Whitacre made it clear he intended to set up toll booths to charge successful internet companies more money to reach "his" customers. Time and time again we've seen the dominant broadband players dabble in ways to limit or restrict access to services without additional payment (and this includes disputes over interconnection and zero rating, even as neither was officially a part of the 2015 open internet rules). The fact that these large providers have consistently sought out ways to break an open internet, and to charge different service providers different fees just to reach the end points shows that a better solution is needed.

Third, the careful implementation of the 2015 rules, using Title II with strong forbearance on most aspects of Title II, have shown that these kinds of rules can and do work, with little

downside. Since the rules were put in place, interconnection disputes between Netflix and broadband providers quickly subsided. Small internet providers, like Sonic and Ting, have embraced these rules and started increasing broadband buildout, knowing that they can better compete against the large dominant players.

Without the Title II rules, it seems clear that we will, instead, see greater consolidation, less competition and greater opportunities for anti-consumer, anti-competitive mischief by the largest players. The existing rules are a starting point for keeping those in check.

Conclusion

We are a small media and research company with less than 10 employees. We don't have lobbyists. We have relied on the internet and its open, end-to-end nature to remain in business for the past two decades -- sometimes with very weak internet connectivity. If that's to continue, we need the FCC to make sure that an open internet remains in place -- and that it is not dominated by just a handful of giant broadband internet access providers, with long histories of bad behavior.

The existing rules under Title II were a step in the right direction. Rolling them back and giving more power to a few giant providers to limit the open internet would be an epic mistake, harming the public, harming competition and harming one of the most vital parts of the internet today.

Keep the existing rules in place and protect the vibrant internet that the public and many small businesses like ours have come to rely on.

Sincerely,

Michael Masnick
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Floor64 Inc. & the Copia Institute
Publisher of Techdirt